

SUSAN TOTENHAGEN
v.
AREA DIRECTOR, MINNEAPOLIS AREA OFFICE,
BUREAU OF INDIAN AFFAIRS

IBIA 87-2-A

Decided February 12, 1987

Appeal from a decision of the Minneapolis Area Director, Bureau of Indian Affairs, finding that Susan Totenhagen was properly removed from the office of Chairman of the Shakopee Mdewakanton Sioux Community.

Reversed and remanded

1. Bureau of Indian Affairs: Generally--Indians: Tribal Government: Constitutions, Bylaws, and Ordinances

The Bureau of Indian Affairs has authority to interpret tribal law in order to determine the tribe's legitimate governing body.

2. Board of Indian Appeals: Generally--Bureau of Indian Affairs: Generally--Indians: Tribal Government: Constitutions, Bylaws, and Ordinances

The Board of Indian Appeals and the Bureau of Indian Affairs should give deference to a tribe's interpretation of its own laws.

3. Indians: Tribal Government: Constitutions, Bylaws, and Ordinances--Indians: Tribal Government: officers

An ambiguous notice provision in an ordinance concerning the removal of tribal officials from office should be interpreted to require that reasonable notice be provided to the official whose removal is sought.

APPEARANCES: Robert S. Thompson III, Esq., Boulder, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Susan Totenhagen seeks review of an April 9, 1986, decision of the Minneapolis Area Director, Bureau of Indian Affairs (appellee), concerning the validity of her removal from the office of Chairman of the Shakopee

Mdewakanton Sioux Community (community). For the reasons discussed below, the Board reverses that decision and remands the case to the Bureau of Indian Affairs (BIA).

Background

By letter dated March 17, 1986, signed by Leonard Prescott, Vice-Chairman of the community (Vice-Chairman), appellant was given notice that a petition calling for her removal as Chairman had been signed by more than one-third of the community's eligible voters. Appellant was further informed that a special meeting of the General Council would be held on March 31, 1986, for the purpose of hearing the removal charges.

In a memorandum dated March 28, 1986, addressed to "Voting Members," appellant stated:

This is official notice that the scheduled removal hearing notice for March 31, 1986, signed by Leonard Prescott is cancelled. The Bureau of Indian Affairs, along with legal counsel and as Chairman, all concur that any meeting held on the date of March 31, 1986 for the purpose of removal hearing is null and void and illegal in accordance to procedures set forth in the Shakopee Mdewakanton Sioux Community Constitution and By-Laws. Furthermore, until due process of the law and the Constitution and By-laws are followed and carried out, I Susan Totenhagen still remain Chairman of the Shakopee Mdewakanton Sioux Community.

Despite appellant's memorandum, a special meeting was held on March 31, 1986, at which 34 community members voted in favor of appellant's removal, none voted against, and one abstained. Appellant did not attend the meeting.

The Vice-Chairman sought appellee's opinion concerning the validity of appellant's removal. By letter of April 9, 1986, appellee informed the Vice-Chairman that he considered the removal valid.

Appellant's appeal of this decision was transferred to the Board by the Assistant Secretary--Indian Affairs under the provisions of 25 CFR 2.19(a)(2). ^{1/} It was received by the Board on October 22, 1986. On transfer to the Board, appellant relied on the briefs she had submitted earlier. Appellee did not file a brief.

Discussion and Conclusions

Appellant makes four arguments on appeal: (1) the removal was invalid under the community's removal ordinance because appellant was not given the

^{1/} Section 2.19(a) provides: "Within 30 days after all time for pleadings (including extension granted) has expired, the [BIA official exercising the review authority of the] Commissioner of Indian Affairs shall: (1) Render a written decision on the appeal, or (2) Refer the appeal to the Board of Indian Appeals for decision."

10 days notice required by the ordinance, (2) appellant's right to due process of law was violated by the failure to provide her with the notice required by the ordinance, (3) the charges against appellant set out in the removal petition were insufficient to sustain the removal, and (4) an insufficient number of qualified voters voted in favor of appellant's removal. Because of its disposition of the appeal, the Board reaches appellant's first argument only.

The community's Ordinance No. 2, enacted on July 11, 1972, sets out procedures for the removal of officers. Resolution No. 11-29-84-001, enacted on November 29, 1984, amends section 2 of the removal ordinance. As amended, the section provides in relevant part:

Section 2: (a) Upon receipt of a petition signed by one third of the eligible voters of the Community, which petition [sic] charges an officer with one or more of the cause [sic] listed above, any officer of the Tribe shall provide the accused officer with written notice of the charges; and notice of a special meeting of the General Council for the purpose of hearing and voting on those charges.

* * * * *

(b) An officer attempting to serve notice pursuant to subsection (a) shall attempt to give personal service to the accused on or in the vicinity [sic] of the residence [sic] for three successive days immediately after the receipt [sic] of the Petition.

(c) In the event that the officer charged cannot be located for personal service pursuant to subsection (b), then the officer seeking to provide notice shall serve that notice by:

(1) Posting the notice in a prominent [sic] place in the community which is commonly used for posting information of concern to the Community, and. [sic]

(2) by registered mail to the last known address of the accused.

(d) The notice shall specify a date for hearing and voting on the charges which is:

(1) No less than 10 days from the date of actual personal service given under subsection (b) or,

(2) No less than 10 nor more than 20 days from the date of posting of service by mail under subsection (c).

The letter informing appellant of the removal hearing, which was dated March 17, 1986, was evidently mailed on March 20, 1986, and received by

appellant on March 26, 1986, 5 days before the hearing. ^{2/} Appellant argues that the removal ordinance requires 10 days actual notice.

Appellee's April 9, 1986, decision states: "The records indicate that service by mail allowed Mrs. Totenhagen sufficient time to prepare an answer to the charges against her." In a July 1, 1986, memorandum appellee states:

It is uncontested that the date for the scheduled hearing was established as March 31, 1986. Included within the attached documents is a receipt for registered mail showing a postmark of March 20, 1986. I, therefore, concluded that the date of posting of service by mail was March 20, 1986, and that the hearing, of which that posting gave notice, could have been held as early as March 30, 1986, and still have complied with the requirements of the Removal Ordinance.

It is apparent that appellant and appellee differ over the requirements of the removal ordinance regarding service of notice by mail. Appellee interprets the ordinance as providing that service is accomplished when notice is mailed. Appellant argues that service by mail is not accomplished until the notice is received by the officer whose removal is sought.

[1, 2] Resolution of this appeal requires interpretation of the community's removal ordinance. BIA and the Board in reviewing BIA decisions have the authority to interpret tribal law in order to determine the tribe's legitimate governing body. Norman M. Crooks v. Minneapolis Area Director, 14 IBIA 181 (1986). Both BIA and the Board should give deference to a tribe's interpretation of its own laws. Kiowa, Comanche and Apache Intertribal Land Use Committee v. Acting Deputy Assistant Secretary-- Indian Affairs (Operations), 14 IBIA 207, 211-212 (1986). In this case, however, no tribal interpretation of the removal ordinance appears in the record.

Appellant has submitted a September 27, 1985, letter from the community's attorney to the members of the community's General Council, which discusses the removal ordinance. Concerning notice, the letter states: "[The] ordinance as amended also requires an advance notice of at least ten (10) days of the date for a hearing before the General Council on the removal petition," and "a petition for removal which does not * * * set a hearing date at least ten (10) days from the date of service * * * is of no force and effect."

The tribal attorney's letter is not entitled to the deference afforded a tribe's interpretation of its own laws. Cf. Estate of Mary Dodge Peshlakai v. Navajo Area Director, 15 IBIA 24, 93 I.D. 409 (1986). However, because

^{2/} The record contains a copy of a receipt for certified mail, No. 473 430 998, with a postmark date of Mar. 20, 1986. It also contains a copy of a return receipt bearing the same number, signed by appellee, with Mar. 26, 1986, shown as the delivery date, both by postmark and in writing.

the attorney's law firm helped to draft the community's removal ordinance, 3/ his interpretation could shed light on the intent of the drafters. His letter conveys a general impression that 10 days actual notice was intended to be required, although it is not explicit with respect to when service by mail is accomplished.

[3] The language of the ordinance itself is confusing. Subsection 2(d) provides: "The notice shall specify a date for hearing and voting on the charges which is: * * * (2) No less than 10 nor more than 20 days from the date of posting of service by mail under subsection (c)." "To post" can mean "to mail," as appellee's decision assumed it meant here. However, this usage is more common in Great Britain than in the United States. 4/ Moreover, "post" is used in another sense, i.e., "to affix in a usual place for public notices," in the immediately preceding subsection 2(c)(1). It seems unlikely that the drafters of the ordinance would have used the same word to mean different things in succeeding subsections.

It is possible that "posting" in subsection 2(d) refers to the posting described in subsection 2(c)(1). If this is the case, the phrase "posting of service by mail" makes no sense, unless it is presumed to contain a typographical error. Given the number of typographical errors which appear elsewhere in the ordinance, 5/ this is indeed a possibility. If there is a typographical error in the phrase, the most likely one would appear to be the substitution of "of" for "or." If "or" was intended, the phrase makes sense but does not purport to identify the point at which service by mail is accomplished. 6/

In the end, the Board is unable to determine from the phrase itself what it is intended to mean, and therefore interprets the phrase in the context of section 2 as a whole. The Board agrees with appellant that, when read as a whole, section 2 conveys a sense that at least a good faith effort to afford 10 days actual notice is required, including the mailing of notice in time to be received 10 days prior to the hearing. 7/ Moreover, 10 days

3/ The Sept. 27, 1985, letter states: "Your Constitution and By-laws and the ordinances which our firm helped to draft provide a procedure for removal of officials from office."

4/ See Random House, American College Dictionary; Webster's Third New International Dictionary.

5/ See quotations from the ordinance, supra and infra.

6/ If "or" was intended, 10 days posting under subsection 2(c)(1) would be sufficient notice under subsection 2(d)(2) regardless of the date of service by mail. There is no evidence in the record that notice was posted 10 days prior to the hearing or even that it was posted at all. The record contains a memorandum concerning the hearing, addressed to all voting members of the community and signed by the Vice-Chairman. The memorandum is dated Mar. 25, 1986, 6 days prior to the hearing. The record does not show whether this memorandum was posted.

7/ The Board recognizes that requiring actual receipt of the mailed notice could prove unworkable because a reluctant recipient could avoid service by failing to accept delivery of the letter.

is a particularly short notice period for service by mail if service is accomplished upon mailing, 8/ and the community should be presumed to have intended that reasonable notice be provided. Therefore the Board finds that under the community's removal ordinance, a good faith effort to provide appellant with 10 days actual notice was required. The Board also finds that mailing the notice 11 days before the hearing did not constitute such a good faith effort.

Subsection 2(e) of the ordinance provides:

Officers who are charges [sic] may appear personally and have the assistance of legal counsel, or may elect to be represented by counsel without a personal appearance. In the event that an officer or his representative fails to appear before the Council after receiving proper notice as described in this section, the Council may, in its descretion [sic], proceed with the hearing in the absence of the charged officer and render such judgement [sic] as it deems appropriate.

Because appellant did not receive the notice to which she was entitled under subsections 2(c) and 2(d), subsection 2(e) renders invalid the March 31, 1986, vote taken in her absence.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the April 9, 1986, decision of the Minneapolis Area Director is reversed, and this case is remanded to the Bureau of Indian Affairs for further action as appropriate.

Anita Vogt
Administrative Judge

I concur:

Kathryn A. Lynn
Acting Chief Administrative Judge

8/ Rules which provide that service is effected upon mailing commonly allow for the mailing period. Rule 5(b) of the Federal Rules of Civil Procedure provides that service is complete upon mailing. Rule 6(e) provides:

"Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period."

The rules of this Board provide that service by mail is accomplished upon mailing but also provide that a party's time for filing a pleading or brief begins to run from his receipt of the precipitating document. 43 CFR 4.310(b), 4.311, 4.320(a), 4.332(a).